# Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-730

AMERICAN EXPORT LINES, INC. and MEDITERRANEAN MARINE LINES, INC.,

*Petitioners,*

—against—

METAL TRADERS, INC.,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

M. E. DEORCHIS
One State Street Plaza
New York, N. Y. 10004
*Counsel for Petitioners*
*American Export Lines, Inc. &*
*Mediterranean Marine Lines, Inc.*

*On the Brief:*

BRIAN D. STARER
CHARLES S. WASSELL
HAIGHT, GARDNER, POOR & HAVENS

# INDEX



## Index to Appendix



## *Cases Cited*

STATUTES AND OTHER AUTHORITIES CITED

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*Petitioners,*

—against—

METAL TRADERS, INC.,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed *in toto* the judgment of the United States District Court for the Southern District of New York.

### Opinions Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto at 1-A.* The opinion of the District Court is unofficially reported at 1977 A.M.C. 1382, and appears in the Appendix hereto at 5-A.

### Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on July 5, 1978. A timely petition for

* (A) refers to appendix herein.

rehearing was denied on August 3, 1978, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## Questions Presented

1. Whether, in an admiralty action involving two negligent co-defendants, damages can be divided equally or apportioned in accordance with the principles established by this Court?

2. Whether in an admiralty action, one of two joint tortfeasor co-defendants must prove:

(a) its freedom from any fault, and;

(b) that the negligence of the other co-defendant was the sole proximate cause of the loss in order to obtain apportionment of liability under the principles established by this Court?

## Statement of the Case

The Petitioners herein are the owners, American Export Lines, Inc., and operators, Mediterranean Marine Lines, Inc., of the container vessel S.S. RED JACKET. District Court jurisdiction was based upon 28 U.S.C. §§1331 and 1333.

The case centers on the loss overboard and damage to 51 containers loaded with various cargoes during the course of heavy weather in the Pacific on January 10, 1974, while stowed at hatch No. 6 on the weather deck of the S.S. RED JACKET. Eventually, eleven lawsuits were filed in the District Court by the cargo interests seeking to recover collectively over $1,300,000 for the alleged losses. The plaintiffs in the eleven actions either directly or by way of third party actions sued petitioners as owners and operators of the S.S. RED JACKET, and respondent, Metal Traders, Inc., for negligent stuffing of two containers, causing the loss or damage to their cargo. Respondent Metal Traders, Inc. was the shipper of eight "house-to-house" (stuffed and sealed by the shipper) containers of tin ingots carried on that voyage of the S.S. RED JACKET. Respondent Metal Traders, Inc., in turn, impleaded the United States of America (U.S.A.) for any judgments rendered against Metal Traders, Inc., as the 75 pound tin ingots had been sold to Metal Traders and stuffed into containers by the U.S.A. pursuant to a purchase contract between them.



Prior to the bench trial of the eleven actions, all three defendants (petitioners, respondent and U.S.A.) stipulated with *all plaintiffs* that each were proper parties entitled to maintain its action and that each had sustained damage as a result of the casualty. In effect, the defendants stipulated that plaintiffs were entitled to recover for their losses. The primary purpose of the petitioners in this action was to obtain contribution, apportionment, or indemnity from respondent on the grounds that their negligence and breach of contract in failing to properly secure thousands of loose 75 pound tin ingots shipped in the two sealed containers caused and/or contributed to the casualty.

At 0624 hours on January 10, 1974, the Captain of the S.S. RED JACKET was standing at the forward end of the navigation bridge looking out the center window, which is just aft of hatch No. 6 on the centerline of the vessel. At about that moment, the Captain witnessed the "settling" of at least two top containers in the fifty-one on-deck containers stowed at No. 6 hatch. The cause of the settling of

the two top containers, one on the starboard side and one on the port side, was later directly related to the collapse of two bottom containers that were located directly below the "settling" containers. The two bottom containers, although stowed on the hatch at the same level, were separated by three other containers and a distance of more than twenty-four feet. In addition, the port side container, CMLU 122590, and the starboard side container, CMLU 127345, had one thing in common, both contained thousands of unsecured, unpackaged loose 75 pound ingots weighing *33703* and *44656* pounds respectively. Each container had been stuffed and negligently stowed for an ocean voyage by or on behalf of respondent Metal Traders, Inc.

Eventually, as the result of the negligently stowed containers becoming damaged and collapsing, forty-three containers were lost overboard.

The Honorable Constance Baker Motley was assigned to the eleven consolidated actions for all purposes. At the request of all counsel, the trial was bifurcated. The liability trial, held during the period from December 13-29, 1976, was concerned only with the *degree of fault* among the defendants. The only defendants were the petitioners, respondent and the U.S.A.

Each defendant alleged that the loss and damage resulted *solely* and *proximately* from the other's negligence. The petitioners defended on the grounds that the losses were not caused by any negligence on their part, but were caused solely by the failure of the respondent to properly stuff and chock the loose tin ingots in the sealed "house-to-house" containers.

Petitioners maintained that during a storm encountered by the vessel while crossing the North Pacific in January, the heavy ingots which had been described in the bill of



lading as "bundles" by the respondent, but which in fact had been shipped loose and completely unsecured in the sealed containers, moved violently in all directions freely inside the containers and eventually caused the collapse of the two containers described above, namely CMLU 122590 and CMLU 127345. As a result, the unitized stacks of containers were carried away, leading to the eventual loss of or damage to 51 containers. The two containers precipitating the collapse were among those lost overboard at sea and were unavailable for examination.

On May 24, 1977, Judge Motley filed her Opinion finding *both petitioners and respondent negligent* but holding petitioners solely liable for the damage. The District Court based its entire decision on the collapse and condition of container CMLU 122590 on the port side and completely ignored the preshipment condition and the occurrence leading to the collapse of container CMLU 127345 on the starboard side. There was not one iota of evidence to establish any negligence on the part of petitioners in any way with respect to the containers stowed on the starboard side.

On June 20, 1977, petitioners filed a notice of appeal to the United States Court of Appeals for the Second Circuit and oral argument was held before that Court on June 15, 1978.

On July 5, 1978, the Court of Appeals rendered its summary opinion and judgment affirming the lower Court's decision on the facts without reviewing the lower Court's conclusions of law. (1-A) Petitioners' timely request for a rehearing was denied on August 3, 1978, without opinion. (3-A).

## Reasons for Granting the Writ

This Court has on at least two recent occasions, *Cooper Stevedoring* v. *Kopke, Inc.*, 417 U.S. 106 (1974) and *United States* v. *Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975) accepted and recognized the international concern for the furtherance of the equitable concept of apportioning damages in maritime cases. The theory is not a new one and this Court has stated that equitably, two negligent parties should each bear its own portion of a loss according to its degree of negligence and if it is impossible or extremely difficult to apportion damages in a situation involving multiple causal factors contributing to the accident, the damages should be divided equally. Instead of attempting to apportion fault between the two defendants which the trial court found to have been negligent, the trial court, in essence, held that under the applicable law the defendants-petitioners may only be responsible on an all or nothing basis. The Court held that unless the petitioners prove that they were free from fault and that the accident was caused solely by the fault of Metal Traders they must bear all the damages themselves. The statement by the district court of the law is as follows:

> "Having failed to prove both no fault on its part and proximate cause fault on the part of MT, AEL must bear the entire liability for damages." (34-A)

While this statement of the law, which was approved by the court of appeals by adoption, may be a correct statement of the law with respect to the liability of the petitioners to the plaintiff cargo owners, insofar as it purports to represent the law as between two co-defendants who were found to be negligent by the court, it clearly is contrary to the applicable law enunciated by this Court in *Cooper*



*Stevedoring Co.* v. *Kopke, Inc., supra,* and *United States* v. *Reliable Transfer Co., Inc., supra.*

The reason for the diverse legal regimes is that a carrier's liability to a cargo owner is covered by the U.S. Carriage of Goods by Sea Act, 46 U.S.C. §§1300-1315, which brings with it a special burden of proof. However, with respect to the liability *inter se* of the co-defendants herein, the Carriage of Goods by Sea Act does not apply; instead, the ordinary rules of tort liability are applicable.

It is clear that the application of the correct law is of vital importance to this case since both containers involved in the accident were lost overboard, and hence, were unavailable for inspection in order to *prove* the cause of their collapse. Since the precise cause of their collapse could not be determined with any degree of accuracy, an equal division should have been made instead of placing the burden solely on the petitioners. This is especially so since the petitioners received the containers pre-stowed and sealed by the supplier; the supplier was in a better position to establish that its negligence did not cause the damages to the containers.

The instant case provides a suitable vehicle for review and clarification of the theory of apportionment in maritime joint tort-feasor actions. The Court of Appeals for the Second Circuit, in adopting the legal conclusions of the District Court, acted in direct conflict with the two most recent maritime apportionment cases decided by this Court. It additionally incorrectly applied the rigid legal regime established for first party cargo damage cases by the Court in *Schnell* v. *The Vallescura,* 293 U.S. 296 (1934).

## I.

**In an admiralty action for contribution, where two co-defendants are found negligent, damages should be divided equally or apportioned in accordance with the recent rulings of this Court.**

This case presents the important questions whether, in an admiralty action, there may be a division of damages or an apportionment of damages according to the proportionate fault of the negligent vendor-supplier and carrier, and, if so, whether the division or apportionment will be effected without burdening one party to prove the precise proportions of relative culpability.

The District Court, as previously noted, found *both* petitioners and respondent to have acted negligently. Despite this concurrent negligence, the lower court placed the entire liability for damages upon petitioners. The lower court's failure to divide or apportion damages was based on the erroneous rationale that the burden of proof against the culpable co-defendant "shipper" was *identical* to the carrier's burden or proving a defense against a plaintiff cargo owner under the Carriage of Goods by Sea Act (COGSA). Using such a burden, aptly described by the courts as "insuperable", the district court in actuality foreclosed any right to recover divided or apportioned damages. The severity of the burden of the carrier against the owner of cargo under COGSA is based upon the sound policy of protecting innocent cargo interests. However, since the action is fundamentally one of contribution or apportionment between two culpable parties, the policy is rendered nugatory and is supplanted by a policy premised on ensuring the safety of the cargo, the ship, and the crew. The rule for division of damages, or in the alternative the apportionment of damages based on the comparative negligence of the co-defendants, should and must be available in a maritime action between two culpable parties.



The concept of division of damages is well ensconced in the doctrines of maritime law. Mr. Justice Marshall bore this out when he stated:

> "Where two vessels collide due to the fault of each, an admiralty doctrine of ancient lineage provides that mutual wrongdoers shall share equally the damages sustained by each. In *The North Star,* 106 U.S. 17 (1882), Mr. Justice Bradley traced the doctrine back to the Laws of Oleron which date from the 12th century, and its roots no doubt go much deeper." *Cooper Stevedoring Co.* v. *Kopke, Inc.,* 417 U.S. at 110 (1974).

The doctrine of division of damages remains to be a vital aspect of admiralty law. Where degrees of fault or causation cannot be determined accurately, the court should not force an all or nothing result by speculation. In *United States* v. *Reliable Transfer Co., Inc.,* 421 U.S. 397, 407 (1975), the Court stated:

> "[T]he divided damages rule has been said to be justified by the difficulty of determining comparative degrees of negligence when both parties are concededly guilty of contributing fault. *The Max Morris,* 137 U.S. 1, 12. . . . When it is impossible fairly to allocate degrees of fault, the division of damages equally between wrongdoing parties is an equitable solution."

Not only has this traditional concept of division of damages been upheld, but the notion has also been extended to now include apportionment of damages based on proportionate fault. This expansive trend has been reflected in the more

liberal application of the doctrine of contribution to admiralty cases, e.g., *Cooper Stevedoring Co.* v. *Kopke, supra; Hurdich* v. *Eastmount Shipping Corp.*, 503 F.2d 397 (2nd Cir. 1974); *Griffith* v. *Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (3rd Cir. 1975), *cert. denied* 423 U.S. 1054 (1976). The underlying rationale for the expansion was this Court's awareness that in some cases justice and equity required the liberality of application, especially when the failure to extend the doctrine could result in a lack of care to be exercised by the parties:

> "Even though the common law of torts rejected a right of contribution among joint tortfeasors, the principle of division of damages in admiralty has, over the years, been liberally extended by this Court in directions deemed just and proper. . . . Indeed, it is fair to say that application of the rule of division of damages between joint tortfeasors in admiralty cases has been as broad as its underlying rationale. The interests of safety dictate that where two parties 'are both in fault, they should bear the damage equally to make them more careful.' *The Alabama, supra,* at 697. And a 'more equal distribution of justice can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame.' See *The Max Morris, supra* at 14." *Cooper Stevedoring Co.* v. *Kopke, Inc.*, 417 U.S. at 110 (1974).

In its holding in *United States* v. *Reliable Transfer Co., supra,* p. 411, a case which expanded the apportionment of damages theory to collision cases, this Court stated that in a collision or stranding, " . . . liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault, and that liability for such damages is to be allocated equally only when the parties are .equally at fault or *when it is not possible fairly to measure the comparative degree of their fault.*" (Emphasis added)



This Court's decision in *Cooper Stevedoring* v. *Kopke, Inc., supra,* removed any doubt about the propriety of awarding contribution in maritime noncollision cases provided that the plaintiff could have sued either or both of the joint tortfeasors. That holding is consistent with other areas of maritime law which allow contribution. For example, in maritime personal injury cases there is no prohibition to division of damages on the basis of proportional fault and the Courts apply comparative negligence doctrines. *United States* v. *Seckinger,* 397 U.S. 203 (1970). Comparative negligence is also applicable when recovery is sought under the Death on the High Seas Act, 46 U.S.C. §§761, 766.

It is erroneous and inequitable to place upon a carrier the same burden of proof to recover a portion of its damages from a negligent co-defendant, as to successfully assert a defense to a suit brought by a cargo owner under COGSA. The burden of proof scheme, as it exists in cargo damage cases, "constitutes a tremendous advantage for cargo owners." H.R. Rep. No. 2218, 74th Cong., 2nd Sess. 9 (1936). To place the same burden upon the carrier when sued by a co-defendant vendor-supplier, acting in the capacity of a maritime contractor, as when sued directly by a cargo owner, would completely absolve the shipper of its responsibility: to avoid acting negligently, to not breach its implied warranty that the packages are fit for carriage in the ordinary way and are not dangerous, and to not breach its implied warranty to perform its functions in a diligent

and workmanlike manner. *Fairmount Shipping Corp.* v. *Chevron International Oil Co., Inc.*, 511 F.2d 1252 (2nd Cir., 1975), *cert. denied* 423 U.S. 838 (1975); *Westchester Fire Ins. Co.* v. *Buffalo Housewrecking & Salvage Co.*, 40 F. Supp. 378 (W.D.N.Y., 1941), *aff'd* 129 F.2d 319 (2nd Cir., 1942).

Mr. Justice Stone, in *Schnell* v. *The Vallescura*, 293 U.S. 296 (1934), stated the rule for apportioning damages in cases involving the owner of the cargo, whether it be the shipper or consignee, and the carrier.* In *The Vallescura*, the Court placed the burden upon the carrier to prove the extent to which the cargo damage was due to one of the causes excepting it from liability to the cargo shipper or consignee. The case, and its rule, are inapposite to the situation where the issue is *not* whether the innocent cargo shipper or consignee will recover, but where the issue is in what proportion the two culpable parties, in this case the vendor-supplier and the carrier, will pay the entire amount to the consignee.

In the typical cargo claim case anticipated and covered by COGSA,

> "[I]n general the burden rests upon the carrier of goods by sea, vis-a-vis the party who owns or is liable for the cargo, to bring himself within any exception relieving him from the liability which the law otherwise imposes on him . . . The reason for the rule is apparent. He is a bailee entrusted with the shipper's goods, with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence, the law casts upon him the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved from liability (citations omitted)." *Schnell* v. *The Vallescura, supra,* at 304-305.

Petitioner, American Export Lines, Inc., as a carrier was a bailee, but the bailors were the consignees of the shipment, not the shipper, Metal Traders, Inc. The opinion in *The Vallescura* is predicated on the superior knowledge of the carrier over the cargo owner. When the container was packed and sealed by the supplier itself rather than the carrier, the superiority of knowledge is with the supplier. Under containerization, a carrier must accept "a pig in the poke." This change has resulted from a change in the mode of transportation from breakbulk to containerized shipments. It is a situation in which the Court should apply the well-established rule in indemnity actions for breach of warranty that:

> "[L]iability should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury."

*Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co., Inc.*, 376 U.S. 315, 324 (1964). In fact, an ocean

* In a case brought by a cargo owner against the carrier defendant, recovery is governed by the Carriage of Goods by Sea Act ("COGSA"), 46 USC §§1303-04. The proof of the case follows the general format that: the cargo owner bears the burden of proving delivery of goods to carrier in good condition and receipt of those goods in a damaged condition; the burden then shifts to the carrier to prove that the loss or damage falls within one of the COGSA exceptions set forth in 46 USC §1304(2); the burden then returns to the owner to show that there were concurrent causes of loss in the fault and neglect of the carrier; finally, if so found, the carrier must show the relative proportions of damage attributable to the carrier and the owner. If the carrier fails to prove the proportion of damages, the carrier must bear the entire loss.

carrier who seeks contribution or indemnity for improper loading and stowage is not required to prove the portion of damages attributable to the loader's negligence *See, Demsey & Assoc.* v. *S.S. Sea Star,* 461 F.2d 1009 (2nd Cir., 1972); *Master Shipping Agency, Inc.* v. *M.S. Farida,* 1976 A.M.C. 91 (S.D.N.Y., 1975).

The district court held that both petitioners and respondent were negligent at various times during the shipment. It specifically found that through Metal Trader's negligence, the tin ingots were improperly stowed. The court also accepted the theory "That container collapsed, . . . , when the unsecured ingots came apart and repeatedly struck the lower portion of the container, particularly the left corner post at the base, causing the post to separate from the containers." (22-A) The collapse of those containers was followed shortly by the collapse of the whole tier of containers.

The Court found the theory plausible "and supported, in the main, by a fair preponderance of the credible evidence." (23-A)

Despite the finding of negligence on the part of Metal Traders, the district court finally concluded:

> "[H]aving failed to prove both no fault on its part and proximate cause fault on the part of Metal Traders, petitioners must bear the entire liability for damages". (34-A)

*Petitioner American Export Lines concedes that, once the two containers involved were lost at sea and unavailable for inspection, it failed to prove its absence of fault; it was one of the two culpable parties. Petitioner also concedes that since the two containers involved were lost at sea and unavailable for inspection, it failed to prove sole (proximate)*



*cause fault on the part of Metal Traders* as the district court used the term. Proximate causation by the courts below was viewed in the terms of an innocent cargo owner suing a culpable carrier under COGSA. Within those parameters anything less than an absence of fault by the carrier and total fault by the vendor-supplier (Metal Traders) results, in actuality, in a finding of no proximate cause. As the district court viewed the matter, for Metal Trader's acts to have been deemed a proximate cause, petitioners would have had the practically "insuperable burden" of proving the portion of the loss caused by the particular exception to liability invoked by the carrier and the portion caused by the supplier's negligence. *J. Gerber & Company* v. *S.S. Sabine Howaldt,* 437 F.2d 580 (2nd Cir., 1971).

Under COGSA (which is not applicable herein), the carrier has to show that it is within an excepted cause, then it has the burden of showing how much of the damages came from the excepted rather than the unexcepted cause. Here we are not involved in excepted or unexcepted causes under COGSA. Petitioners' action against respondent is based upon respondent's breach of implied warranties and negligence in failing its duty as a maritime contractor to properly stuff the container. There is no language in the cases which indicate that the intent of COGSA was to place a supplier who has been sued by cargo interests in the same advantageous position as a plaintiff-cargo owner would be.

The "insuperable burden" of proving the proportionate share of loss should not be applicable in this case between co-defendants. The cases that apply the "insuperable burden" rule are cases in which the ocean carrier was seeking to lessen its liability only against the plaintiff cargo interest suffering damage. *See,* e.g., *Vana Trading Co., Inc.* v.

*S.S. Mette Skou*, 556 F.2d 100 (2nd Cir.) *cert. denied* 434 U.S. 892 (1977); *J. Gerber & Co.* v. *S.S. Sabine, supra; Lekas & Drivas, Inc.* v. *Goulandris*, 306 F.2d 426 (2nd Cir., 1962). This is not the typical cargo claims case anticipated and covered by the language in COGSA. That statute requires that cargo shippers or their consignees be protected against the loss or damage to their cargo from the negligent acts of the carrier. There is no question in this case that the consignees were not liable and will recover the full extent of their damages. *In fact, it was stipulated that the cargo owners would recover their damages, only the amount remained in question.*

To allow a supplier, such as Metal Traders, to perform its duties negligently and still not be held liable for its improper actions is simply a bad policy. The district court's use of the term "insuperable burden" was well chosen for when the cargo supplier ships a container "house-to-house", only it knows whether the container was correctly packed.

What was at stake was the safety of the cargo, the ship and its crew. It would be the rare case indeed where the carrier could prove the proportionate fault of the supplier which packed a container which fell overboard. Under the lower courts' rulings, there is little incentive for the shipper to ensure the proper stowage of the container without impetus by the court. It is for this Court to clarify its recent rulings on contribution and to develop a functional division and apportionment scheme in admiralty actions involving negligent co-defendants. This catastrophy was limited to the loss of containers in this case, without adequate incentives to ensure proper stowage; the next time the same accident occurs may very well result in losses far greater than containers.



## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

M. E. DeOrchis
One State Street Plaza
New York, N. Y. 10004
*Counsel for Petitioners*
*American Export Lines, Inc. & Mediterranean Marine Lines, Inc.*

*On the Brief*:

Brian D. Starer
Charles S. Wassell
Haight, Gardner, Poor & Havens

# APPENDIX

**Opinion and Judgment of Court of Appeals**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5th day of July, one thousand nine hundred and seventy-eight.

Present:

HON. WILLIAM H. MULLIGAN,
HON. JAMES L. OAKES,
HON. MURRAY I. GURFEIN,
*Circuit Judges.*

Dkt. 77-7321, 77-7340

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S.S. RED JACKET, Her Engines, Boilers, etc., and AMERICAN EXPORT LINES, INC.,

*Appellants, Defendants and Third Party Plaintiffs,*

—against—

METAL TRADERS, INC.,

*Appellee, Cross-Appellant, Third Party Defendant and Fourth Party Plaintiff,*

—against—

UNITED STATES OF AMERICA,

*Appellee and Fourth Party Defendant.*

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Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on the opinion of Judge Motley below. 74 Civ. 1448 (S.D.N.Y. 1977).

The primary issue in this case was the determination of the cause of the collapse of container 122590. This issue involved questions of fact which were solved by the district court in a manner supported by substantial evidence on the record. We cannot find Judge Motley's findings of fact to be clearly erroneous and we therefore affirm the decision of the district court.

/s/ WILLIAM H. MULLIGAN
William H. Mulligan



**Order Denying Rehearing by Court of Appeals**

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the third day of August, one thousand nine hundred and seventy-eight.

Present:

HON. WILLIAM H. MULLIGAN
HON. JAMES L. OAKES
HON. MURRAY I. GURFEIN

*Circuit Judges.*

Docket No. 77-7321

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HOULDEN & CO., LTD.,

*Plaintiff,*

—v.—

S.S. RED JACKET, her engines, boilers, etc., & AMERICAN EXPORT LINES, INC.,

*Defendant & 3rd Party Plaintiff-Appellant,*

—v.—

METAL TRADERS, INC.,

*3rd Party-Defendant & 4th Party-Plaintiff-Appellee.*

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A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ A. DANIEL FUSARO
A. Daniel Fusaro,
*Clerk*



**Opinion of District Court**

HOULDEN & CO., LTD.,
*Plaintiff*,

—v.—

S.S. RED JACKET, *et al.*,
*Defendants.*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
May 10, 1977

74 Civ. 1448, 74 Civ. 2770, 74 Civ. 4464, 74 Civ. 4718, 75 Civ. 172, 75 Civ. 604, 75 Civ. 894, 75 Civ. 1020, 75 Civ. 1021, 75 Civ. 1034, and 75 Civ. 1035.

HILL, RIVKINS, CAREY, LOESBERG & O'BRIEN (MARTIN B. MULROY and THOMAS D. TOY), *for Plaintiffs in 74 Civ. 1448, 74 Civ. 2770, 74 Civ. 4718 and 75 Civ. 172.*

DONOVAN, DONOVAN, MALOOF & WALSH (RICHARD E. REPETTO and BARTHOLOMEW J. HENNESSEY, JR.), *for Plaintiffs in 75 Civ. 604 and 75 Civ. 894.*

GRAHAM & SIMON (SEYMOUR SIMON), *for Plaintiffs in 75 Civ. 1020 and 75 Civ. 1021.*

BIGHAM, ENGLAR, JONES & HOUSTON (VINCENT L. LEIBELL, JR. and JOHN KOCHENDORFER), *for Plaintiffs in 74 Civ. 4464, 75 Civ. 1034 and 75 Civ. 1035.*

HAIGHT, GARDNER, POOR & HAVENS (M. E. DEORCHIS, BRIAN D. STARER and BRUCE C. BERINGER), *for Defendant S.S. Red Jacket, American Export Lines, and Mediterranean Marine Lines.*

WHITMAN & RANSOM (PAUL M. BROWN and GARY P. ROSENTHAL), *for Metal Traders, Inc.*

ROBERT B. FISKE, JR., United States Attorney, and GILBERT S. FLEISCHER, Admiralty & Shipping Section (WARREN A. SCHNEIDER), *for the United States.*

CONSTANCE BAKER MOTLEY, D. J.:

These 11 consolidated cases arise out of a catastrophe which occurred on board the container ship S.S. *Red Jacket* on January 10, 1974. On that date, during a storm in the North Pacific, a stow on the weather deck at the No. 6 Hatch consisting of 50 containers collapsed, sending 43 containers overboard and damaging the remainder. The cargo damage claims, alone, exceed one million dollars.

Plaintiffs in each of these cases are shippers or consignees of the cargo which was either lost or damaged. Each plaintiff has sued the vessel and the owner of the vessel, American Export Lines, Inc. (AEL), for damages. AEL denies any liability to plaintiffs. In addition, one of the plaintiffs sues another plaintiff, Metal Traders, Inc. (MT), the shipper of 8 containers of tin ingots carried on board the *Red Jacket,* alleging that the loss or damage to its cargo was caused by MT's failure to properly stow the ingots within the containers.

Upon being sued, AEL cross-claimed for indemnity against MT or impleaded MT, as a third-party defendant,



claiming that the cargo loss and damage were not caused by any unseaworthiness or negligence on AEL's part but were caused by the failure of MT to properly stow its cargo of tin ingots within the containers as required by its contract (the bill of lading) with MT. AEL claims that during the storm the ingots came loose from their original unbanded, unsecured stacks of 15, were propelled about, and caused the collapse of a particular container of ingots (Container No. CMLU 122590) stowed on deck at the No. 6 Hatch. When this particular container collapsed, AEL says, the effect was the same as the effect on a stack of dominoes, *i.e.,* its collapse then caused the entire stow of 50 containers to collapse, sending 43 containers overboard, as the vessel alternately rolled heavily to port, and damaging the remainder.

MT responded by claiming that the loss and damage to the cargo stowed on deck at the No. 6 Hatch resulted solely from (1) the negligence of AEL in several respects; (2) the unseaworthiness of AEL's vessel; (3) the unseaworthiness of the containers supplied to MT by AEL for stowage of the ingots. With respect to negligence, MT alleges that its cargo of tin ingots should have been stowed below deck; that the containers were improperly lashed; that the containers had not been properly maintained, repaired, and inspected; that shippers of dense cargo had not been properly advised with respect to stowage; that special, half-height, open-top containers, or containers known as gondolas, for the stowage of dense heavy cargo should have been furnished; and that AEL knew or should have known of the improper storage before the vessel sailed, and failed to take corrective action.

In addition to disclaiming any liability on its part, MT, as fourth party-plaintiff, impleaded the United States of America as fourth-party defendant, claiming that any lia-

bility for improper stowing falls not on it but on the United States. MT had purchased the tin ingots shipped on board the *Red Jacket* from the General Services Administration (GSA). This agency, pursuant to its contract with MT, had agreed to load the tin ingots into the containers (free on board carrier's conveyance). The containers had been supplied by AEL at MT's request for a "house to house" shipment. MT alleges that the ingots were properly loaded and stowed in the containers by the United States. Alternatively, MT alleges, that if the ingots were not properly loaded and stowed, any liability resulting from improper loading and stowing must fall on the United States whose duty it was under the contract between it and MT to properly load the ingots and who had the best opportunity, as the one who loaded the ingots into the containers, to properly secure them. MT also alleges that the United States knew or should have known the ingots were to be shipped overseas. It then claims that the United States had the duty to properly load and stow the containers for a sea voyage; and if it did not know the loading and stowing requirements for such a voyage, it should have inquired of AEL.

The United States replies that it properly loaded the containers according to its contract with MT. If additional securing was required because the ingots would be going on a sea voyage then, says the United States, MT had the duty to request it and to pay additional charges for same as provided in their contract. MT admittedly did not request any special packing or stowing, did not pay for any additional packing or stowing, and gave no special instructions whatsoever regarding packing or stowing. The United States, therefore, claims that any liability for improper stowage is properly placed on MT as the shipper of the goods and not on the United States which merely sold the



goods to the shipper. It simply agreed, as a part of the purchase price, to load the goods, f.o.b. the carrier's conveyance. The United States denies that it knew the ingots were to be shipped directly to Japan after it loaded them into the containers. The United States also claims, along with MT, that all the loss and damage was due solely to the negligence of AEL, the unseaworthiness of its vessel, and the unseaworthiness of the containers which it supplied.

AEL further asserts, in these consolidated actions, a direct right of action against the United States and MT for loss of and damage to its 50 containers. AEL also claims it is entitled to recover from the United States and MT for damage to its vessel from the unrestrained containers after the collapse of the stow.

The trial was bifurcated and proceeded first, on December 10, 1976, on the issue of liability of the respective parties. As a result of that trial, the court makes the following findings of fact and conclusions of law.

*Findings of Fact and Conclusions of Law.*

During November and December 1973, each plaintiff had delivered cargo to AEL for transport from East Coast ports of the United States to Japan and Taiwan on board the *Red Jacket*. Most of this cargo had been delivered to AEL in sea-going containers supplied by it. Other cargo was delivered to the pier and loaded into containers by AEL. Each plaintiff, including MT, received clean bills of lading from AEL or its subsidiary, Mediterranean Marine Lines, Inc., also sued as a defendant in these actions. The bill of lading required that containers, in which the cargo had been stowed by each shipper, be properly packed. It also required that after loading the container be sealed by the shipper. It further required that the seal number and a description of the cargo be placed on the bill of lading

which had been prepared by the shipper or its agent on forms supplied by AEL. MT described its cargo as "bundles of tin ingots," giving the number of such bundles in each container.

MT, as the shipper in this case, also had the responsibility for picking up the containers from AEL's agent and arranging for the transportation of the containers from the place of loading the cargo to the pier. No AEL agent was present at the loading of MT's containers. A 10% discount was allowed the shipper for stowing his own cargo in the container. Containers were not unsealed after arrival at the pier for inspection, unless it appeared that the container had been damaged, or unless such opening was requested by the shipper. Dangerous cargo was to be so marked. These sealed container shipments loaded by the shipper were known in the industry as "house to house" shipments. However, a shipper could opt for pier to pier shipment at a 10% higher cost. In the latter case, the vessel owner's agents would stow the cargo in the sea-going containers. Each container was either 20 or 40 feet long, 8 feet high and 8 feet wide, with doors that opened at the after end and on which the seal was placed.

In November 1973 MT, through its agents, requested that AEL provide it with 9 containers to be used for a shipment of cargo, 200 long tons of tin ingots, on board the *Red Jacket* from the United States to Japan. AEL complied with this request. Each ingot was approximately four inches wide, five inches in depth, eighteen inches long, and had a two inch lip extending out from each end of the top side so that the ingot could be lifted by a forklift or other device. Each ingot weighed 75 pounds. Thirty bundles, weighing approximately 16 tons, were loaded into a 20 foot container bearing No. CMLU 122590. The liability controversy here has focused on two of the 9 containers of ingots;



the first, CMLU 122590; the second, CMLU 122179. Four of these 9 containers were stowed on the weather deck at the No. 6 Hatch along with 46 other containers. One of the 9 containers was stowed on deck at the No. 1 Hatch; one on deck at No. 3 Hatch; two below deck in the forward section of the No. 6 Hatch. The ninth container, CMLU 122179, was off-loaded in New York before the vessel sailed.

Only the 50 containers stowed on deck at the No. 6 Hatch collapsed and were lost overboard or were severely damaged. The other containers on board with ingots suffered some damage but remained in stow. Some of the lashings on the stow at the No. 5 Hatch were broken by sliding containers from the collapsed stow at the No. 6 Hatch. There was also some relatively minor damage to the vessel which the court finds was caused by the storm and not from sliding unrestrained containers.

Since this was a container ship, it was equipped to carry containers on the weather deck as well as in the hatches. Consequently, a request for below deck stowage, unless the cargo was marked dangerous, would be ignored. The court finds that AEL was not negligent in stowing the ingots on deck.

MT, a trader in metals, had contracted with a freight forwarder in Boston, A & M Custom Brokerage Co., to arrange for this shipment of the tin ingots to consignees in the Far East on a "house to house" basis. A & M was the regular freight forwarder for MT in Boston. MT's instructions on this occasion were to arrange for the transportation of the tin ingots from Davisville, Rhode Island to the pier in Boston and to prepare the appropriate bills of lading. MT also hired Yale Transport, Inc. (Yale) to obtain the empty containers and deliver them to Davisville. There the tin ingots were to be loaded into the containers at the United States Navy Construction Battalion Center on a loose,

"as-is," basis by the GSA employees. Yale was then to deliver the loaded and sealed containers to the pier in Boston. Yale obtained the empty containers from Intermodal Container Agency, AEL's Boston agent, and drove them to Davisville where the ingots were loaded into the containers by forklift trucks operated by Government employees. The containers were then sealed by GSA employees after the contents were checked for amount by the Yale driver, in accordance with his instructions. The containers were then driven by Yale to the J. F. Moran Terminal in Boston where they were received by AEL's agents and loaded on board a feeder vessel for the voyage to New York. The Yale drivers did not make note of any damage to the containers.

The contract between MT and the United States provided for loading the ingots "loose." This turned out to be loading the ingots into the containers in stacks consisting of 15 ingots—three across and five high. When placed in these stacks of 15 they were referred to as "bundles." These bundles of 15 were the way in which the ingots had been stacked on the grounds of the federal installation in Davisville. When the bundles were loaded onto the floors of the containers, they were arranged three across, a space between each, starting at the front end of the container. This pattern was then repeated. Next, the bundles were placed four across, a space between each. This pattern continued to the rear of the container. The bundles were placed in the container in such a way as to have them abut each other at the after end of each bundle from the front of the container to the rear. However, there were spaces remaining between each row of bundles and space remained between the skin of the container and each outside row of bundles. The bundles were not banded or strapped together, as the use of the word "bundle" might suggest.



They were not secured in any way. There was no chocking, dunnage, platform or other securing devices employed to keep the bundles from moving or coming apart. MT and the United States claimed that the manner in which the ingots were stacked and then placed in the containers made them self-securing. This claim was contradicted by the photographic evidence of containers off-loaded in Yokohama, Japan which showed that the stacks of ingots had simply crumbled and had fallen to the floor of the containers. Yokohama was the first port into which the vessel had pulled after the storm. There surveyors employed by AEL surveyed the damaged cargo and took numerous photographs of the damaged containers.

The contract between the United States and MT provided: "Any expense over and above those customarily required for normal loading shall be for the account of the purchaser." Additionally, the contract provided: "When delivery is f.o.b. carrier's conveyance, the purchaser shall, at least 5 calendar days prior to the desired date of shipment, furnish the Government complete shipping and document distribution instructions and the necessary commercial bills of lading to accomplish shipment including, but not limited to, designation of type and kind of conveyance, carrier routing, minimum load per conveyance, shipping schedule, *and any other pertinent instructions.*" (Emphasis added.)

It is undisputed that MT did not request any additional securing or give the GSA any special instructions regarding stowage. Neither the United States nor MT made any inquiry as to how this heavy dense cargo should best be stowed in containers for a sea voyage, although the evidence disclosed there were agencies from whom such advice could have been secured without charge. These agencies held themselves out as expert in stowing containers. MT

gave no instructions to its agents, the freight forwarder, or Yale Transport, regarding the stowage of the containers.

The evidence showed, however, that on a prior occasion MT instructed the GSA that the ingots should be banded. This was an occasion on which the ingots were shipped to Pennsylvania. The court finds that MT failed to give proper instructions to GSA regarding packing of the ingots for a sea voyage as required by its contract with GSA.

Upon arrival at the terminal in Boston, the 9 containers were loaded on board the S.S. *Great Republic*, a feeder vessel, which took them and other cargo to New York for transshipment to the S.S. *Red Jacket*. During the course of unloading the containers in New York on December 18, 1973, one of the containers, CMLU 122179, was found to be severely damaged. It was thereupon removed by AEL's agents to a storage area for inspection and repair. Some time after the *Red Jacket* had sailed on December 26, 1973, the damaged CMLU 122179 container was opened. This delay was apparently caused by the holiday season and the fact that another vessel would not soon be leaving for Japan. It is AEL's claim that the damage to CMLU 122179 had been caused by the shifting of the ingots. However, the evidence on this point is in conflict. There was evidence that the container had been dropped during loading or unloading operations in New York.

The cargo of tin ingots was subsequently removed from CMLU 122179 and restowed flat, apparently two high, on the floor of another container by AEL's agents. A wooden platform was placed over the ingots thus restowed and other bracing dunnage employed to secure the platform on the cargo itself. The new container was loaded onto the *Red Jacket* on its next voyage to Japan. As a result of MT's cross-examination of the master of the *Red Jacket* on the voyage here in question, the master testified that it had



been reported to him that during the course of that second voyage, the new container was damaged by sea water coming on deck during a storm. It had been placed on deck at the No. 1 Hatch. The door of the container had been pushed in by the water, causing the container to be filled with water which, in turn, pushed out the sides of the container.

The evidence on the trial established that one of the causes of damage to containers is from green water (sea water) coming on deck. In the instant case, however, the evidence was that the containers at the No. 6 Hatch were sprayed by sea water as opposed to being hit by green water. Sea water did, however, come on deck at the No. 1 Hatch but did not cause any damage to the stow at that hatch on the instant voyage.

Other tin ingots purchased by MT from the GSA were also shipped to consignees in Europe about the same time the ingots in question were shipped to Japan. These ingots were carried by the Dart Line. MT received a cable on January 31, 1974, from Antwerp, Belgium sent by Dart's agents advising that when two of three containers shipped there arrived, two of the containers were found to be not in good order and the ingots had to be restowed. The evidence at trial showed that one of the major causes of damage to containers is improperly stowed cargo.

Although it was the general practice, when a container such as CMLU 122179 arrived at the pier in a damaged condition, to notify the shipper and AEL's inspector of containers and to have a joint determination made as to its fate, this practice was not followed in this instance. There was no attempt made to contact either MT or Marine Surveys, Inc., the company hired by AEL to inspect its containers as they are being loaded and unloaded and to note any damage which has occurred to the containers. These notes are made on "field sheets" and submitted to

AEL's supervisors at the pier before the vessel sails. Moreover, no one advised the master of the *Red Jacket,* Captain Lawrence, of the damage which had occurred to Container CMLU 122179 either before or after the *Red Jacket* sailed and before the catastrophe, or of the fact that the ingots stowed therein had to be reloaded, or of the conclusions allegedly reached at that time by one of AEL's employees in charge of the loading and unloading that the damage to CMLU 122179 was caused by shifting of the ingots within that container. As a result, there was no effort made to ascertain whether there were other containers on board the *Red Jacket* with tin ingots which might shift and cause damage because of improper stowage.

The *Red Jacket* sailed from the port of New York on December 26, 1973 enroute to Japan. It is a container ship 602 feet long, 90 feet wide, with a depth from the keel to the edge of the bulwark of 60 feet. It can carry approximately 834 twenty foot containers, including 364 containers 20 feet long on deck. On the voyage in question, there were 811 containers on board and the vessel was heavily laden. It was 4⅝" below its winter mark of 33'8". It travelled a route which came within 20 to 30 miles of the winter zone in the North Pacific. It had a stability rating (GM) of 2.30 feet. The required GM was 2.60 feet.

Shortly after leaving New York, the master of the vessel noted that the lashings on several stows of containers on the deck had not been lashed in accordance with regulations. The lashing requirements for the containerships are calculated by the builder. Lashing is usually done by marine lashers and is always accomplished before the vessel sails. The master, therefore, ordered the crew to correct this condition with additional lashings. The ship's log does not specifically disclose whether the lashings on the stow at the No. 6 Hatch were relashed. However, the master testified



that he was positive that the stow at No. 6 Hatch had been relashed since he witnessed that particular task. The court finds that the stow on the No. 6 Hatch had not been lashed in accordance with requirements before the vessel left New York.

The purpose of the lashings was to keep the containers from racking, *i.e.,* being distorted into parallelograms as a result of side to side movements. The evidence further disclosed, and the court so finds, that another major cause of damage to containers is from racking, a phenomenon found to be inherent in the structure of containers. It occurs when the container sways heavily to one side and the motion is then reversed.

On January 10, 1974 while the *Red Jacket* was in the North Pacific it encountered extremely heavy weather described, in part, as consisting of confused and boisterous swells, cross swells, with a wind force on the Beaufort scale moving from 4 to 8. At one point the wind force went to 10 on the Beaufort scale. This means that the winds were between 50 and 55 miles per hour. During the storm, which had commenced on January 9, the rolling of the vessel was generally between 20° and 25°. The vessel was rolling comfortably. However, at one point the vessel rolled between 35° and 40° to port. The vessel at this point was hove to. Despite this deep roll, and the severity of the storm, the court finds that the vessel was at all times under proper navigational control, was not overloaded, and presented no special stability problems. The court, therefore, finds that the vessel, itself, was not unseaworthy. The court also finds that the loss here did not result from any navigational error.

The vessel continued to roll almost all the way to Yokohama, Japan. AEL concedes that the weather experienced was the type of weather to be expected in the month of

January in the North Pacific. There is, consequently, no peril of the sea defense in this case.

The court finds that during the course of this storm, beginning at 0624 hours on January 10, on the 40° roll to port, the 50 containers which had been stowed on deck at the No. 6 Hatch began to collapse and to break loose from their stow; 43 eventually went overboard. The others, though damaged, remained on deck.

The containers which had been stowed at the No. 6 Hatch had been stowed 3 high and 10 across. On the top and bottom of each container corner is a device known as a stacking key which permits one container stacked upon another to be locked into the container below. In addition, there is a bridge that goes on the top tier and which ties each row of containers to the next row. The containers on the *Red Jacket* were either 40 foot containers or two 20 foot containers laid end to end. The 50 containers were stowed in such a way as to create a square. A container is constructed in such a way as to bear the weight of at least two additional containers filled with cargo on top of a single container. In this case, although some of the containers may have been overweight, allowances were made for overweight due to overloading the containers.

The 50 containers were lashed with heavy wires placed diagonally across the ends of the first two tiers of containers to form an "X" and vertically from the top of the third tier of containers to the deck of the vessel. The wires are attached to a device called a tensioner on the deck, the purpose of which is to prevent them from being drawn too tightly. There was no proof from which the court could find that the wires on the stow at No. 6 Hatch were drawn too tightly or that the wires parted before the stow collapsed. When the wires part, there is a lightening like effect. The wires had been regularly checked during the voyage to



prevent them from coming loose, but, as noted above, the containers at the No. 6 Hatch had to be relashed after the vessel sailed from New York.

The two containers at issue here, CMLU 122590 and CMLU 122179, and many others on board the *Red Jacket*, had been purchased by AEL in 1966. Therefore, at the time of the accident, these containers were about eight years old. The evidence disclosed that containers have a useful life of about 10 years minimum and fifteen years maximum. Container CMLU 122590 had a very low value for insurance purposes. One of AEL's agents estimated that Container CMLU 122590 had been on about 20 or 30 voyages prior to the accident in question. There were no records produced at the trial of the repairs that had been made to Container CMLU 122590 or any of the other containers since original purchase. AEL claimed it had no such records and that it was too difficult to keep such records on individual containers.

The strength members of the containers are the four corner posts, the two top, two bottom, and four side rails. The top rails are sometimes referred to as headers. The bottom rails are referred to as the sills. The bottom side rails of Container CLMU 122590 consisted of two parts, one above the floor of the container and one below the floor of the container. The weight of the cargo within a container is borne by the floor of the container which is generally made of wood. Each container in controversy here was constructed in such a way as to bear the weight of 100,000 pounds on each corner post. The walls of a container are not strength members and are generally made of aluminum or fiberglass with a plywood liner. The containers upon which this controversy focuses had aluminum side rails with steel runners going under the floor from side to side. The strength members of the containers were thus

made of steel, except for the side rails. The steel corner posts were welded to the steel headers at the top and the steel sills at the bottom of each container. Although the inside walls of the container may have been covered with plywood, the corner posts and welds were exposed. The corner posts are also welded to each of the corner castings.

The corner casting is a separate part which is welded to the top of each corner post. The function of the corner casting is to receive the lifting mechanism known as the spreader. The spreader is a rectangular frame corresponding in size to the roof of a container. Attached to each corner of the spreader is a long wire at the end of which is a lock fixture which is inserted into the corresponding lock fixture of each corner casting. These corresponding lock fixtures are then locked together so that the container can be lifted and then loaded or unloaded. There have been accidents due to the failure of one or more of the locking fixtures to function or lock properly, causing damage to the corner casting and the container itself. Once a corner casting is damaged it cannot be repaired. A new corner casting is required. There was evidence that another cause of damage to containers is the dropping of one end or the entire container as a result of malfunction of the locking fixtures. There was no proof that Container 122590 had been dropped. However, the evidence showed that the misplacement of the spreader with relation to the roof of a container could result in making a hole in the roof of the container.

During the course of the trial only two eyewitnesses to the catastrophe were called to testify by AEL, although the existence of at least one other eyewitness was made known to the other parties. One witness was the master of the vessel. The other witness was the chief engineer. The master of the vessel testified that the No. 6 Hatch was located right in front of the bridge where he had been stationed for 36 hours throughout the storm. The bridge was located about 20 feet above the third tier of containers at the No. 6 Hatch and about 15 to 18 feet aft of the third tier at that Hatch. The captain had an unobstructed view of the after end of the two top tiers of the containers in the stow on the weather deck at the No. 6 Hatch. He could not see the bottom tier. At 0624 hours on January 10, 1974, the captain saw the top aft container, a 20 footer in the third row from the port side of the stow at No. 6 Hatch, settle down on the container below about 6 to 10 inches. In the third row on the bottom tier was Container CMLU 122590. He also saw the two containers on top of the last two rows on the portside come down vertically. His opinion was that the containers underneath on the bottom tier were pushed out from under these top containers.



The first engineer had a direct view of the aft end of the containers at the No. 6 Hatch and particularly of the aft end of CMLU 122590 from one of the portholes of his bedroom. The bedroom was located on an upper deck on the port side of the vessel just aft of the No. 6 Hatch. This upper deck where the bedroom was located was one deck above the weather deck. Container CMLU 122590 had been stowed on the bottom tier of the third row in from the port side of the 50 container stow. At about 0623 hours, the first engineer saw the left rear corner post on the aft end of Container CMLU 122590 break loose from the container at the top and swing inboard and aft. He also saw the left side (port side) of the Container CMLU 122590 collapse. He then saw the lashings on the entire stow begin to come loose. After this, the entire stow began to break loose and collapse. As the vessel rolled heavily to port, more and more containers went overboard.

Before Container CMLU 122590 was loaded on board the *Red Jacket* in New York, an employee of Marine Surveys, the company hired by AEL to inspect its containers for damage during loading and unloading, noted that this particular container had sustained "major structural damage" in the from of a projection of the right bottom side rail out from the side of the container, 4″ x 6′ x 2″. The six foot length referred to the length of the projection along the bottom side rail parallel with the floor of the container. Despite this notation of major structural damage, the container had been loaded on the *Red Jacket*. That particular container had also sustained a hole 15″ x 12″ in the front left corner of the roof. Three other containers which had been stowed at the No. 6 Hatch had also sustained damage according to the inspector's report. In addition, many other containers which had been loaded on the *Red Jacket* were found by the inspector for AEL to have been damaged, some major, some minor.

As noted earlier, the ingots had been stowed into Container CMLU 122590, a 20-foot container, without being banded or strapped or secured in any way. Into that particular container had been loaded 30 bundles of tin ingots. Each bundle consisted of ingots piled three across and five high, as previously described. These 30 bundles of ingots weighed 16 tons. Twenty foot containers have a 20 ton capacity. It is AEL's theory that the stow on the deck at No. 6 Hatch collapsed as a result of the collapse of Container CMLU 122590. That container collapsed, says AEL, when the unsecured ingots came apart and repeatedly struck the lower portion of the container, particularly the left corner post at the base, causing the post to separate from the container. The collapse of the left wall of Container CMLU 122590 followed, according to AEL. This led to the settling of the two top containers in the third tier in



which CMLU 122590 had been located, and which had been noted by the captain. Then followed the settling of other top containers in adjacent portside tiers as the bottom containers in those tiers were pushed out by the cargo from CMLU 122590. AEL claims the same thing happened on the starboard side of the stow where other ingot containers were stowed.

The court finds this theory of how the catastrophe occurred plausible and supported, in the main, by a fair preponderance of the credible evidence. However, the court concludes that the role of the unrestrained ingots in this catastrophe was not established by a fair preponderance of the evidence.

The sum total of the evidence as to the role of the ingots was as follows:

First, it is undisputed that the ingots as loaded into Container CMLU 122590 had not been secured by chocking or dunnage or in any other way. There were spaces left between the outside rows and the skin of the container. This meant the bundles were capable of collapsing if the container were subjected to severe motion. However, there was no convincing proof that the ingots, in spite of their weight, could be propelled about. The photographic evidence showed that the ingot bundles simply crumbled to the floor.

Second, there is the undisputed fact that Container CMLU 122179 had been severely damaged and had to be off-loaded in New York after being brought down from Boston on the feeder vessel. However, it is not clear that the ingots caused this damage. There was evidence that this container may have been dropped. The cargo of tin ingots was reloaded and restowed in a new container. This time the ingots were stowed, as the photographic evidence

discloses, in a manner which suggests that the ingots, as originally loaded by GSA employees, were not properly secured for a sea voyage. The reloading showed the ingots in total restraint. Notwithstanding this total restraint, this new container was damaged on the second voyage to Yokohama by sea water coming on deck. This evidence was elicited from the captain of the first voyage without objection.

Third, there are photographs of the inside of other containers which carried ingots. These had been stowed in other areas of the vessel. When these containers were offloaded in Yokohama, Japan and opened, the pictures reveal that the bundles of ingots had crumbled to the floor. These pictures proved that some of the ingots had landed with great force against the skin of the container near the lower portion. These photographs show the dent marks which apparently had been made by the lips of the ingots on the skin of these containers.

Fourth, in addition to heavy rolling from port to starboard, the vessel had been subjected to heavy pitching resulting from waves coming directly at the bow of the ship. There were also simultaneous heavy cross swells. But, significantly, there was no convincing proof that the ingots singly or in groups were of sufficient weights to cause the collapse of the corner post.

Fifth, of three containers of ingots which had been shipped about the same time to Antwerp, Belgium by MT and which had been purchased from GSA and loaded by it in the same way as the ingots in question, two containers arrived damaged and the ingots in those two containers had to be restowed. But there was no proof as to how those particular containers were damaged. At best this



was proof that the ingots could cause damage to containers but not proof that they could cause the collapse of a container.

Finally, improperly stowed cargo, the evidence disclosed, is a major cause of damage to containers. However, there was no preponderance of evidence that a major cause of the collapse of containers is improperly stowed cargo.

In sum, the court finds that the role of the ingots with respect to the collapse of Container CMLU 122590 was not established. There were ingots in other containers in even more vulnerable positions on board ship and in equally deteriorated containers in terms of age which did not cause the collapse of those containers. The court, therefore, cannot find that improper stowage of the ingots in Container CMLU 122590 was a proximate cause of the loss and damage to plaintiffs.

The improper stowage of the ingots was the result of MT's negligence. The bill of lading required that MT properly "pack" the container. MT requested the GSA to pack the container. GSA agreed. MT was negligent in failing to request securing of the ingots within the containers by GSA as required by their contract. The ingots were going on a sea voyage in a sealed, "house to house," container. This fact alone should have suggested to MT that the container should be properly packed since it would not be opened again until it reached its ultimate destination. The manner in which the ingots were stowed may have been sufficient for over the road travel, but it was not sufficient for a winter weather sea voyage. The contract between MT and the United States plainly provided that if additional securing was required, it would have to be requested by MT and paid for by MT. That was not done. MT, as the shipper of these tin ingots, was also negligent in failing

to inquire of AEL or any one else as to the kind of stowage this dense heavy cargo required for an overseas voyage. AEL was able to prove that MT, as the shipper of the ingots, gave no consideration to the question of stowage of the goods in the containers. Although MT was negligent in many respects, this negligence resulted in damage to the skin of the Container CMLU 122590 but was not a proximate cause of its collapse.

MT claims that AEL's negligence was the sole cause of the January 10, 1974 catastrophe. The court finds AEL was also negligent. AEL was negligent in permitting Container CMLU 122590 to be loaded on board the *Red Jacket* with major structural damage which had been noticed by its own agents prior to the loading. This negligence was a proximate cause of the catastrophe.

MT says AEL should have immediately inspected Container CMLU 122179 when it off-loaded that container on December 18, 1973. If it had done so, says MT, it could have restowed the 8 other containers before the vessel sailed on December 26, 1973. The delay in inspecting Container CMLU 122179 was not unreasonable, however, because of the shortage of men during the Christmas Holiday season and the fact that there was not going to be another voyage to Japan soon. AEL discharged its duty by off-loading that particular container. The court, therefore, finds that AEL was not negligent in failing to immediately inspect the inside of Container CMLU 122179.

This eight year old container, CMLU 122590, which had been on 20 or 30 prior voyages, which had undoubtedly been subjected to racking in the past, and which had major structural damage, was not reasonably fit for its intended purposes. The container was, therefore, unseaworthy. This unseaworthiness was likewise a proximate and concurrent cause of the catastrophe.



Although there was evidence that the containers had not been properly lashed upon leaving New York, there is no evidence from which the court could find that the relashing ordered by the captain after the vessel had sailed was not sufficient.

The weather conditions, of course, played a part in the catastrophe. This court finds that the weather on January 10, 1974 caused constant and heavy rolling of the vessel which, in turn, caused additional racking of a severe nature to Container CMLU 122590. The evidence demonstrates that racking can cause the welds on the four corner posts to crack. The court finds that the collapse was caused by cracking of the welds on an old damaged container. Since the weather was to be expected, the heavy weather is not sufficient to relieve AEL of liability. However, since the Container CMLU 122590 was old and weakened by prior racking and major structural damage, these conditions and the racking on this occasion played a major role in the catastrophe and were concurrent proximate causes of the accident.

GSA agents had been notified that the ingots were to be placed on a sea voyage by the original order. The containers into which the ingots were loaded were containers used for carrying cargo on container ships. The containers were sealed by GSA agents after loading. From these facts GSA agents should have noticed that the ingots were destined for a sea voyage. The containers were to be driven to a vessel terminal in Boston. This was again notice to the United States that these containers were to be loaded on board a ship. Despite the abundance of this notice, the United States failed to ascertain whether this dense heavy cargo had been properly stowed within the containers or required additional securing for a seagoing voyage or a different type container. This failure to inquire on the part of

the GSA agents was not negligence, however. The GSA employees could reasonably have assumed that if additional securing was required, the shipper, also having first hand knowledge of the nature and quality of its goods, would have requested it as specifically required by the contract between GSA and MT. In fact, the evidence disclosed that on a prior shipment MT had requested banding of the bundles of ingots and this was done by the GSA employees.

AEL also knew as a result of the bill of lading that dense heavy cargo in the form of tin ingots was to go on its vessel to Japan. Although it had this knowledge, it failed to inquire of MT as to how the cargo had been secured. Significantly, the bill of lading failed to require a description of how the goods were packed and secured. Such a requirement might have put AEL on notice that an inspection was in order. The court finds that AEL was negligent in failing to require shippers of sealed house to house containers to disclose on the bill of lading the manner in which the cargo is packed and secured within the container. It is not enough to require a description of the cargo as this case demonstrates.

AEL was also negligent in failing to supply MT with a gondola or half height type container used for dense heavy shipments. The half height containers have steel sides and open tops. The gondolas do not have sides. A canvas cover is generally tied on top of a half height to keep out rainwater. The container next to CMLU 122590 on the port side was a half height with a canvas cover. It contained loose wire.

The court finds that the collapse of Container CMLU 122590 was caused by the age of the container, its damaged condition, and severe racking. Once there was a collapse in the stow, this, in turn, caused the entire stow to collapse.



The jurisdiction of this court is not in dispute. 28 U.S. Code, secs. 1331 and 1333; 46 U.S. Code, sec. 740. The Carriage of Goods by Sea Act, 46 U.S. Code, sec. 1302, 1303, 1304 (COGSA), defines the rights and immunities, duties and liabilities of carriers and ships with respect to the transportation of goods by sea. Under COGSA, the carrier is required, before the commencement of any voyage, to exercise "due diligence" to make the vessel seaworthy. This encompasses the duty to properly man, equip, and supply the ship. This duty extends to making the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation. Whenever loss or damage to cargo has resulted from unseaworthiness, the burden of proving the exercise of "due diligence" is on the carrier. And neither the carrier nor the ship shall be liable for loss or damage arising from unseaworthiness, unless caused by want of "due diligence" on the part of the carrier to make the ship seaworthy. [§1304(1)].

COGSA specifically places upon the carrier the duty to properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried [§1303(2)].

In addition, under COGSA, neither the carrier nor the ship may be held liable for loss or damage arising from sixteen enumerated causes [1304(2)(a)—(p)]. Among these are: perils, dangers, and accidents of the sea [(2)(c)]; acts or omissions of the shipper or owner of the goods, his agent or representative [(2)(i)]; insufficiency of packing [(2)(n)].

COGSA provides that neither the carrier nor the ship shall be liable for any other cause arising without the actual fault or privity of the carrier and without the fault or neglect of the agents or servants of the carrier. In such cases, however, the burden of proof is on the carrier, when

claiming such exemption, to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage. [Sec. 1304(2)(q)].

In this case, all plaintiffs received from AEL or its agents bills of lading attesting to the apparent good order and condition of the goods delivered to AEL in containers for shipment on board the *Red Jacket.*[1] These bills are *prima facie* evidence of the receipt by the carrier of the goods therein described. [Secs. 1303(3), (4)]. It is not disputed by AEL that the plaintiffs' goods were either not delivered or were delivered damaged. What AEL disputes is that it is in any way responsible for the loss or damage. However, plaintiffs having made out a *prima facie* case, in order to be exonerated from liability, the burden of proof shifted to AEL to show that the loss came within one of the exceptions to liability set forth in COGSA. Once it has done so, the burden rests upon the shipper to show that there were, at least, concurrent causes of loss in the fault and neglect of the carrier, unless it is one of the kinds of negligence specifically excluded under the Act, *e.g.* sec. 1304(2)(a). If the shipper does so, then the carrier has the practically insuperable burden of proving the portion of the loss caused by the particular exception invoked and the portion caused by its negligence. If the carrier fails to do so, it loses all exoneration and must bear full liability for the loss. *J. Gerber & Company* v. *S.S. Sabine Howaldt,* 1971 AMC 539, 548, 437 F.2d 580, 588 (2 Cir., 1971).

[1] As to plaintiffs Getz Bros., Inc. and Nippon Unbrako, Ltd., the bills of lading signed and issued to them do not indicate that their shipments were loaded on board in a containerized condition. These plaintiffs claim, without contradiction from AEL, that they simply delivered a number of cartons, which the bills of lading indicate were received in good order and condition, and which were then containerized by AEL.



Looking at COGSA, AEL says, first, that there was no lack of due diligence on its part at the commencement of the voyage with respect to the seaworthiness of its vessel or any of its equipment or the parts of the ship in which goods are carried [Sec. 1303(1)]. "Due diligence" is what a reasonably prudent vessel owner would have exercised under the circumstances. *California & Hawaiian Sugar Refining Corp.* v. *Winco Tankers, Inc.,* 278 F. Supp. 648, 652-653 (E.D. La., 1968); *accord, General Foods Corp.* v. *Troubador,* 1951 AMC 662, 98 F. Supp. 207, 210 (S.D. N.Y., 1951). And the standard for determining whether a vessel is seaworthy is not a standard requiring perfection but one mandating reasonable fitness. *Atlantic Banana Co.* v. *M.V. Calanca,* 1972 AMC 880, 342 F. Supp. 447, 452 (S.D. N.Y., 1972), *aff'd* 1974 AMC 1894, 489 F.2d 752 (2 Cir., 1974).

> "It does not require a ship which will weather every conceivable storm or withstand every imaginable peril of the sea, but only a vessel reasonably suitable for the particular service." *President of India* v. *West Coast Steamship Co.,* 1963 AMC 649, 213 F. Supp. 352, 356 (D. Ore., 1962), *aff'd* 1964 AMC 1500, 327 F.2d 638 (9 Cir., 1964), *cert. denied,* 377 U.S. 924, 1964 AMC 1925 (1964).

Plaintiffs and MT say that Container CMLU 122590 was unseaworthy in that it had sustained major structural damage and that AEL failed to use "due diligence" in permitting that container to be loaded on board. The facts found by this court support both of these contentions. The standard of reasonable fitness applies to all of the ship's equipment, including containers supplied to shippers for the purpose of "house to house" shipments. Consequently, a container which is found to have major structural damage is by definition not reasonably fit for its intended purpose.

AEL failed to do what a reasonably prudent vessel owner would have done under the circumstances of this case. It was advised, by reference to the field sheets prepared by its own agents, that Container CMLU 122590 had sustained major structural damage. Despite this direct, notification to it, the container was not further inspected or off-loaded.

AEL attempted to explain away this damaging proof by suggesting that the particular agent who made the notation of major structural damage on the field sheet really did not intend such a description and that this could be gleaned from the fact that he was young and inexperienced. The evidence was to the contrary. It is true that the young agent had been on the job as a trainee for only about five months, but during that time he had inspected many such containers in the same way in accordance with his instructions. But even more significant is the fact that the evidence revealed that, in any event, only a cursory visual inspection of the exterior is afforded each container as it is being lifted from the dock and loaded into the hold of the vessel or onto its deck. The young agent was capable by reason of his training and experience to perform this simple task of exterior inspection and to note any damage.

There was no proof of any other more thorough inspection before the containers were given to shippers for this voyage. Due diligence with respect to containers requires something more than a cursory visual inspection at time of loading. *Cf. Union Carbide & Carbon Corp.* v. *Walter Raleigh,* 1952 AMC 618, 109 F. Supp. 781, 783 (S.D. N.Y., 1951), *aff'd sub nom. Union Carbide & Carbon Co.* v. *United States,* 200 F.2d 908 (2 Cir., 1953); *Ore Steamship Corp.* v. *D/S A/S Hassel,* 1943 AMC 947, 137 F.2d 326, 329 (2 Cir., 1943). There were no records produced relating to repair of Container CMLU 122590. The container was at least 7 or 8 years old and had a very low value for insurance purposes. The young agent had no recollection whether two years before his trial testimony he intended to write 6 "inches" instead of 6 "feet" with reference to the extent of the projection along the right bottom rail of Container CMLU 122590. AEL claimed that the field sheet appeared to read 6″ instead of 6′. Due diligence required that this kind of inquiry as to what was, in fact, meant, be made at the time of loading, and immediately after the note was made, not at the time of trial. If such an investigation had been made and it had been determined that the notation should have been 6″ and not 6′, as contemporaneously recorded, there was no proof of such an investigation offered by AEL at the trial.



Moreover, the field sheet contains two asterisks, as instructed, to indicate to a reviewer that major structural damage had been inflicted on this particular container as opposed to one asterisk to indicate minor damage. These field sheets are turned over to AEL supervisors at the pier after they are made and before the vessel sails. The conclusion is, therefore, inescapable that Container CMLU 122590 sustained major structural damage rendering it unfit for the carriage of dense heavy cargo and that AEL failed to use "due diligence" to prevent this unseaworthy container from being loaded on the *Red Jacket.* Having failed to prove "due diligence" at the commencement of the voyage to make the ship's cargo containers seaworthy, AEL is liable to plaintiffs for their losses resulting from such unseaworthiness, the court finds, were proximate causes of the loss and damage to plaintiffs.

AEL denied that it was guilty of a lack of due diligence and set out to prove that the losses sustained by the plaintiffs were caused by MT's acts and omissions, the acts and omissions of its agents and representatives, including the United States, and the insufficiency of its packing [1304

(2)(i) and (n)]. As set forth above, AEL was joined in this effort by one of the other cargo claimants. The evidence established that the tin ingots were not properly packed within the containers and that this failure caused damage to the skin of the containers, but it failed to establish that this improper packing of Container CMLU 122590 was a proximate cause of the collapse of that container. The proof offered by AEL's expert was not persuasive on the issue of whether the ingots could have contributed to the collapse of the container. The more convincing evidence was that the ingots did not contribute to the collapse. The proof offered by MT's expert that racking was the proximate cause of the collapse of the Container CMLU 122590 was far more convincing. Having failed to prove both no fault on its part and proximate cause fault on the part of MT, AEL must bear the entire liability for damages. AEL made no effort to prove the extent of the damage to its containers caused by MT's improper packing as opposed to damage inflicted on the skin of the other containers by other cargo on prior voyages, another insuperable burden. AEL must consequently bear all of this loss.

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-730

AMERICAN EXPORT LINES, INC. AND MEDITERRANEAN MARINE LINES, INC.,

*Petitioners,*

—against—

METAL TRADERS, INC.,

*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PETER K. LEISURE
522 Fifth Avenue
New York, New York 10036
*Counsel for Respondent*
*Metal Traders, Inc.*

*Of Counsel:*

PAUL M. BROWN
GARY P. ROSENTHAL
WHITMAN & RANSOM

## INDEX



*Cases Cited*



*Statutes and Other Authorities Cited*

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# RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

## Preliminary Statement

The issues in this case involve solely factual determinations of liability arising out of a loss of containerized cargo at sea. Petitioners American Export Lines, Inc. ("AEL") and Mediterranean Marine Lines Inc. ("MML"), AEL's subsidiary (hereinafter, for convenience referred to collectively as "AEL"), already have lost this case three times: first, before the United States District Court for the Southern District of New York, which totally absolved Respondent Metal Traders, Inc. ("MT") from any liability and found AEL's negligence to be the sole proximate cause of the loss; secondly, before the United States Court of Appeals for the Second Circuit, which unanimously affirmed the District Court's determination; and finally,

again before the Second Circuit, which denied AEL's Motion for Reargument.

AEL now petitions this Court in an effort to obtain a fourth "bite at the apple". In an attempt to persuade this Court that vital legal questions are presented, AEL misconstrues the nature of the case and the proceedings and determinations below to such an extent that the recitation in the Petition bears little resemblance to what actually transpired. The most egregious aspect of the Petition is its false premise, to wit, that the liability trial was concerned with assessing degrees of fault between defendants, whereas, in fact, its very purpose was to determine whether any liability to plaintiffs existed.

The simple truth is that AEL was found liable on the basis of the evidence adduced and that no alleged acts of omissions by MT contributed to the loss. In view of such determination, it was unnecessary for the Courts below to reach the questions of law which AEL would now seek permission to have this Court review.[1]

In short, this case raises no real questions of law, and, in any event, is not an appropriate vehicle for a consideration thereof. Accordingly, it is respectfully urged that AEL's petition be, in all respects, denied.

## Counterstatement of the Case

AEL's statement of the case, particularly the "facts" set forth throughout its Petition, is so fraught with inaccuracies that correction is required.

At approximately 6:24 A.M. on January 10, 1974, the S.S. Red Jacket, a container ship owned and operated by AEL, while sailing through a severe storm in the North Pacific,

[1] AEL presented to the Second Circuit the same arguments it seeks to raise here. The Second Circuit, by affirming the District Court's findings under the "clearly erroneous" rule, agreed that only factual questions were involved.



suffered a casualty when some 50 laden ocean shipping containers, all stowed on deck at the Red Jacket's number 6 hatch, were either lost overboard or severly damaged. MT had shipped eight containers of Banka Brand tin ingots on said voyage. Those containers, which were consigned to plaintiffs Mitsui and Ataka in Japan, were located at various stowage positions on the vessel, including some at hatch #6.

As a result of such casualty, AEL was sued by various shippers and/or consignees for loss and/or damage to their cargo. Eventually eleven lawsuits were filed seeking a collective recovery of more than $1,300,000 for the alleged losses.

In each such action, AEL either impleaded or cross-claimed against MT alleging, in essence, that the tin ingots shipped by MT were improperly packed and responsible for the loss. MT, in turn, impleaded the United States of America ("U.S."), from whom MT purchased the tin ingots already packed by the U.S. in sealed containers, alleging that if the tin ingots indeed were responsible for the loss, it was the sole fault of the U.S. in failing properly to pack them for ocean shipment.

The eleven actions were consolidated for both pre-trial proceedings and trial. The consolidated case was tried on a bifurcated basis, with liability tried first. The liability issues were tried extensively to the Court sitting without a jury from December 13, 1976 through December 29, 1976. On May 24, 1977, the District Court filed its opinion finding, in quite vivid and detailed terms, AEL solely responsible for the loss and completely absolving MT and the U.S. from liability (5-A)[2].

It was AEL's contention at trial that the casualty was caused by *one* container[3] (CMLU 122590) in which were stowed 16 tons of ingots shipped by MT. That container was stowed on deck at hatch No. 6 at stowage position 608 aft,

[2] (A) refers to the Appendix to AEL's Petition.

[3] AEL's "two container" theory first unsuccessfully surfaced before the Court of Appeals.

located at the bottom row of the third tier of containers inward from the port side of the vessel. It was AEL's conjecture that the ingots in that container broke through the port side container wall, pushing or incredibly "running through" the cargo of the two adjacent port-side containers, pushing them overboard and resulting in a loosening of the stow, which allegedly caused the remaining containers, in a domino-like effect, to fall over the side on each succeeding roll of the vessel or otherwise be severely damaged. No competent evidence was adduced by AEL to support this speculative theory.

MT contended that it was in no way at fault; that the ingots were properly packed in the containers, but that in any event the casualty could not have been, and was not, caused by any alleged negligence in loading the tin ingots in the containers. MT offered and proved at trial (although not required to do so) that AEL was negligent in many respects and it was in fact AEL's sole negligence which proximately caused the loss.

Specifically, MT contended primarily that the containers furnished by AEL, particularly CMLU 122590 which allegedly initiated the collapse, was defective and unseaworthy; that the containers were improperly lashed; that the containers had not been properly maintained, repaired and inspected; that shippers of dense cargo such as MT had not been properly advised with respect to stowage and that special purpose containers were available and should have been furnished by AEL for the stowage of MT's cargo; and that if MT's cargo indeed was improperly stowed, AEL either actually knew or should have known about it in sufficient time to take corrective action, but failed to do so. In this connection, the District Court, in summary, specifically found:

a. That AEL was negligent in permitting container CMLU 122590 to be loaded on board the Red Jacket with major structural damage (26-A);

b. That container CMLU 122590 was unseaworthy (26-A);



c. That AEL was negligent in failing to require shippers of sealed house to house containers to disclose on the bill of lading the manner in which the cargo was packed and secured within the container (28-A);

d. That AEL was negligent in failing to supply MT with a gondola or half-height container for the carriage of its heavy, dense cargo (28-A);

e. That AEL failed to exercise due diligence in permitting container CMLU 122590 to be loaded on board (31-32A);

f. That AEL failed to exercise due diligence in not requiring more than a cursory inspection of its containers at the time of loading (32-A); and

g. That AEL failed to exercise due diligence by omitting to contemporaneously investigate the nature and extent of the severe structural damage to container CMLU 122590 (33-A).

From among the numerous instances of negligence bordering upon recklessness on the part of AEL, the District Court found the following to be the sole and concurrent proximate causes of the loss:

a. AEL's negligence in permitting container CMLU 122590 to be loaded on board the vessel with major structural damage (26-A);

b. The unseaworthiness of container CMLU 122590 (26-A);

c. The "racking" (17-A) phenomenon to which the already old, weakened, negligently maintained and damaged container CMLU 122590 was subjected to on the voyage in question (27-A); and

d. AEL's lack of due diligence at the commencement of the voyage to make the ship's cargo containers seaworthy and the consequent and obvious unseaworthiness of container CMLU 122590 (33-A).

Having found AEL's negligent conduct to have proximately caused the casualty, the District Court then focused upon the collapse of container CMLU 122590 itself. In this connection the District Court found that:

> " . . . the collapse of container CMLU 122590 was caused by the age of the container, its damaged condition and severe racking . . ." (28-A)

In reaching its determination, the District Court carefully reviewed the evidence as to the role of the ingots in the catastrophe. Based upon all the evidence, including lengthy expert testimony, the District Court properly concluded that irrespective of the fact that container CMLU 122590 carried tin ingots, or the manner in which said cargo was packed in the container, the casualty was caused solely by AEL's negligence and the unseaworthiness of its container. In short, but for AEL's negligence, the accident would not have happened whereas MT's negligence, if any, was found to have no relationship to the occurrence.

AEL seriously misstates the portions of the record and the facts hereinafter discussed apparently in a desperate attempt to bolster its unfounded contentions of law concerning apportionment of damages which were neither germane to the District Court's determination nor even reached by the Second Circuit Court of Appeals.[4]

**Reasons for Denying Writ**

This case neither presents important legal questions nor does it even provide a proper factual context for the consid-

[4] Indeed, AEL's entire argument here, previously made to the Second Circuit, ignores the vital fact that MT's negligence, if any, was found *not* to have been a contributing cause of the loss. AEL's arguments could only gain currency if the Courts below found *concurrent causation* on the part of MT and AEL.



eration of such questions. Apparently recognizing the deficiencies in this regard, AEL attempts to create such a case:

a. AEL states that the liability trial concerned only the "degree of fault" among defendants (Petition, p. 4), implying that causation was not an issue. In reality, the damage trial did not even reach the issue of the degree of fault between the parties inasmuch as it was found that MT's cargo was not responsible for the loss.

b. AEL refers to a stipulation between the parties agreeing that plaintiffs were entitled to recover their losses (Petition, pp. 3, 16). Contrary to the implication AEL seeks to create, defendants did not stipulate that they were *liable* to plaintiffs. Who, as among the defendants, would bear responsibility for the catastrophe, was the very subject of the liability trial, since each defendant denied any liability at all. Indeed, plaintiffs fully participated at the trial and were found to have made out a *prima facie* case against the carrier, AEL (30-A).

c. AEL also attempts to "color" its argument by now contending that two of the containers shipped by MT, one on the port and one on the starboard side caused the loss. In fact, while AEL lamely claimed that one of the containers on the starboard side stowed with MT's cargo was involved, it offered no credible proof on that issue. Indeed, AEL's entire case was directed toward proving that the port side ingot container, CMLU 122590, precipitated the casualty.

d. To lend a further aura of substance to its argument, AEL regrettably misstates the District Court's opinion (Petition, p. 14). A mere glance at the pertinent portion of District Court's opinion (22-A) discloses that the Court was merely reciting AEL's *contentions* as to how the casualty occurred. The District Court was there referring (23-A) only to the plausability of the theory that the collapse of container 122590 precipitated the casualty, *and clearly not as to what caused the container to collapse, or AEL's theory of the role of the tin ingots therein.* This is made crystal clear by a full quotation of this

portion of the District Court's opinion, the last sentence of which AEL has omitted:

> "The Court finds this theory of how the catastrophe occurred plausible and supported, in the main, by a fair preponderance of the credible evidence. *However, the Court concludes that the role of the unrestrained ingots in this catastrophe was not established by a fair preponderance of the evidence."* (23-A, emphasis added)

The District Court then went on to marshall the overwhelming evidence of AEL's liability and MT's lack thereof. (23-28A).

Thus, inasmuch as there was no finding of concurrent fault, apportionment of damages is clearly not a proper subject for review by this Court, particularly within the context of this case. Indeed, AEL's entire case against MT was constructed of the sheerest speculation and conjecture.

## I

## IN ANY EVENT, THE ISSUES AEL PROFFERS FOR REVIEW HAVE BEEN LONG SINCE PREVIOUSLY DETERMINED BY THIS COURT IN A MANNER ADVERSE TO AEL'S POSITION

As previously noted and directly contrary to the decisions of the Courts below, AEL's argument is based on the erroneous and misleading premise that the conduct of both AEL and MT caused the casualty.

Within this fanciful context, AEL proceeds to argue that damages should be apportioned. But, even assuming that such issue was ripe for determination, the rules governing apportionment of damages in cargo loss cases were long ago determined by this Court in *Schnell* v. *The Vallescura* 293 U.S. 296 (1934) and have since been consistently applied by the several Circuit Courts, including the Second Circuit. *Vana Trading Co., Inc.* v. *S.S. Mette Skou* 556 F2d 100 (2d Cir), *cert. denied* 434 U.S. 892 (1977); *J. Gerber & Company* v. *S.S. Sabine Howalt* 437 F2d 580 (2d Cir, 1971); *Lekas & Drivas, Inc.* v. *Goulandris* 306 F2d 246 (2d Cir. 1962).



AEL attempts to avoid this tremendous weight of authority by arguing that the Carriage of Goods by Sea Act (COGSA) is not applicable, because MT, clearly a "shipper" within the meaning of COGSA, was a defendant and not a plaintiff. Nowhere does any language in COGSA admit of the construction that AEL seeks, and AEL has pointed to no convincing authorities which support that view.

Furthermore, AEL overlooks the fact that *it* is governed by COGSA. Thus, as AEL explains (Petition, p. 12), once the plaintiff shippers have made out a *prima facie* case against the carrier (which they did in this case (30-A)), the carrier, in order to escape liability, must show that the damages resulted from an excepted cause under COGSA. This AEL attempted, *but failed to do,* by its claims that MT's cargo caused the loss. As a result of that failure of proof, and not by reason of the rules laid down by this Court in the *Vallescura* case, *supra,* AEL was found to be solely responsible for the loss.

A final word may be appropriate. The so-called "container revolution" indisputably has been of tremendous economic benefit to the shipping industry. However, shipping companies, such as AEL, have attempted to utilize containerization as a vehicle for avoiding their duties and responsibilities at the expense of innocent and unsuspecting cargo shippers. AEL cannot use COGSA as both a shield and a sword. The matter presently before this Court, presents a clear case in point.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that AEL's Petition, should be denied in all respects.

Respectfully Submitted,

PETER K. LEISURE
522 Fifth Avenue
New York, N. Y. 10036
Counsel for Respondent,
Metal Traders, Inc.

*Of Counsel:*

Paul M. Brown
Gary P. Rosenthal
Whitman & Ransom